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No. 890

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

J. B. KING,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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Petitioner J. B. King prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above cause on October 7, 1968.

CITATION TO OPINION BELOW

The Supreme Court of Tennessee gave no opinion, but simply denied the petition for writ of certiorari of the petitioner to the Court of Criminal Appeals of Tennessee (R-33).

The opinion of the Court of Criminal Appeals of Tennessee is unreported, but appears in the Record at R-25-R-29.

Judgment of the Court of Criminal Appeals of Tennessee appears at R-31.

A certified copy of pertinent portions of the Record, containing the matters raised by this petition is filed simultaneously with this petition, and references to the Record will appear as "R- " which refers to the number that appears in the lower righthand corner of the pages of the Record.

JURISDICTION

Judgment of the Supreme Court of Tennessee was entered October 7, 1968 (R-33). Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

HOW FEDERAL QUESTION IS RAISED

Petitioner was indicted by the Knox County, Tennessee grand jury in a one-count indictment charging him with assault with intent to commit murder in the first degree with a deadly weapon, to-wit: a pistol, upon the person of one Glenn Rose, by shooting him. The shooting occurred November 14, 1964. Petitioner was arrested the same day on a warrant of the Municipal Court of the City of Knoxville, Tennessee, and was bound over to the Knox County grand jury by the Municipal Court within two or three days thereafter. Petitioner was not indicted until March 25, 1966, and was not tried until March 20, 1967, resulting in petitioner being convicted of assault with intent to commit murder in the second degree, and sentenced to one to five years imprisonment (R-8, R-11).

A civil suit was filed against petitioner by said Glenn Rose in the Circuit Court for Knox County, Tennessee, styled: *Glenn Rose* v. *J. B. King,* No. 25325, on May 10, 1965, for damages by reason of the shooting, in the amount of $50,000.00, which resulted in a civil judgment against petitioner herein in the amount of $2,000.00 which has been paid. Said civil case was tried on March 11, 1968.

Petitioner was denied his right to a speedy trial, as guaranteed him under the Sixth Amendment to the Constitution of the United States, by reason of the failure of the State of Tennessee to indict him from the date of his arrest on November 14, 1964 until March 25, 1966, when he was indicted.

When this case came on for trial, the petitioner immediately made motion that the indictment be dismissed for failure of the State to accord him his right to a speedy trial. The Trial Court made the following observation with respect to this motion to dismiss:

> "THE COURT: Well, the Court overrules the motion. At least I overrule it at this time, unless the proof would—after we hear the case—if there's matters that are brought out, I would change my opinion. That's a long time, in the Court's opinion, from the time when something happened until a man's indicted. As far as from the indictment forward, the Court doesn't find any basis at all to give any credence to the motion. Of course, he was indicted within the period of the statute of limitations for the offense. In the Court's opinion, this motion should be overruled at this stage anyway, but if something develops in the trial that I saw was different, I would change my mind. I don't believe the motion is timely and let the motion be overruled as stated by the defendant's counsel and exception duly noted."
>
> (R-22-R-23)

At least three or four grand juries had met and adjourned before petitioner was indicted (R-22).

Although the Trial Court stated that if it appeared in anywise during the trial that petitioner was prejudiced by the delay in bringing the indictment, then the motion to dismiss the indictment would be granted. It was very forcefully brought to the attention of the Trial Court during the trial that petitioner was prejudiced by the delay in bringing the indictment. It affirmatively appears in the record that at least two witnesses to the shooting had disappeared; that petitioner after indictment made every effort to locate them prior to trial, all to no avail. The record shows also that the delay in presenting the matter to the grand jury and bringing the indictment resulted in many witnesses' memories being vague and indefinite as to many of the important details. One of the most important details concerned a conversation between the alleged victim Rose and petitioner just prior to the shooting. None of the witnesses could remember the details of the conversation. Another vital detail in the case was whether petitioner's pistol had been fired more than once. Rose, who was shot, testified that petitioner shot three times. Petitioner testified he shot only one time. The pistol was taken from petitioner by the arresting officers, but it was never produced in the trial of the case, although petitioner called for its production. Petitioner testified that the pistol was fully loaded when he fired it one time and if produced it would show it was fired only once. The delay in bringing the indictment must have had something to do with the disappearance of the pistol. Rose's testimony that petitioner shot at him more than one time could have been considered by the jury as negating the plea of self-defense and the plea of defending another who was being assaulted by Rose with a billy-club at the time petitioner shot Rose.

No explanation was made by the State as to the disappearance of the pistol. No explanation was made by the State as to the reason for the delay in presenting the indictment.

It would appear that Rose was more interested in collecting damages in his civil suit against petitioner, which was filed within six months of the shooting, than in prosecution of the criminal case which was not presented to the grand jury until more than sixteen months after the shooting, and the case was not tried until more than twenty-eight months after the shooting. It would appear that Rose was using the threat of criminal prosecution over petitioner in an effort to force petitioner to pay him civil damages.

The opinion of the Court of Criminal Appeals of Tennessee, which is the only written opinion in the case, makes a grievous error in its statement on page 1 thereof (R-26), as follows:

> "An accused cannot claim that he has been denied the right to a speedy trial when he acquiesced in or requested the delay. Citing cases."

It is respectfully submitted that the learned Court of Criminal Appeals for Tennessee did not comprehend the gravamen of petitioner's appeal. It appears in the record that on one occasion, *after indictment*, the case was passed on motion of counsel for petitioner, but on all other occasions it was passed on application of the State of Tennessee. The passing of the case, *after indictment*, is not the gravamen of the complaint raised herein by petitioner. The error raised by petitioner is that he was denied his right to a speedy trial by reason of the failure of the State to indict him from the date of his arrest on November 14, 1964 until March 25, 1966.

It will be noted, too, that in the opinion of the Court of Criminal Appeals of Tennessee (R-27), the State would require the petitioner to make a request of the District Attorney that he be indicted, or that the matter in which he was involved be presented to the grand jury. The law imposes no such burden on a defendant. Furthermore, a prosecutor's responsibility to proceed without unnecessary delay begins not when the indictment is returned, but when the prosecution is begun [which in the instant case was at the time of arrest on November 14, 1964]. *Hanrahan* v. *U. S.*, (1965) 348 F.2d 363, 121 U.S. App. D.C. 134, on remand 255 F.Supp. 957.

QUESTION PRESENTED

Was petitioner denied the right to a speedy trial, and by reason thereof should the indictment have been dismissed?

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ."

Fourteenth Amendment to the Constitution of the United States:

> "§1. * * * *Due process of law—Equal protection.* —* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 9, Constitution of Tennessee:

> *"Right of the accused in criminal prosecutions.*— That in all criminal prosecutions, the accused hath the right to . . ., in prosecutions by indictment or presentment, a speedy trial, . . ."

STATUTE INVOLVED

Tennessee Code Annotated:

> "*40-2001. Speedy trial—Right to be heard.*—In all criminal prosecutions, the accused is entitled to a speedy trial, . . ."

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Tennessee in this case is in direct conflict with decisions of this Court.

The question presented is of major importance and significance to the administration of justice, so as not to have federal decisions and State decisions in conflict with respect to constitutional rights.

The Supreme Court of Tennessee is bound under the federal Constitution to follow decisions of this Court, and in this case, it flagrantly ignored the decisions of this Court. Under the Fourteenth Amendment the States are held to the same standards required under the Sixth Amendment. *Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792; *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758; *Pointer* v. *State of Texas,* 380 U.S. 400, 85 S.Ct. 1065; *Miranda* v. *State of Arizona,* 86 S.Ct. 1602.

The most exhaustive decision we have found on the right to a speedy trial is that of *Petition of Provoo,* D.C. Md. 1955, 17 F.R.D. 183, affirmed 76 S.Ct. 101, 350 U.S. 857, 100 L.Ed. 761.

Under the facts of the instant case there is no doubt that petitioner was denied his right to a speedy trial guaranteed him under the Sixth Amendment to the Constitu-

tion of the United States, Article 1, Section 9, Constitution of Tennessee, and §40-2001, Tennessee Code Annotated.

It is not the duty of an accused to press that he be prosecuted upon indictment under penalty of waiving his right to a speedy trial for such failure. *U. S.* v. *Dillon,* (D.C., N.Y., 1960) 183 F.Supp. 541.

The mere lack of a speedy trial in and of itself is not sufficient to reverse a conviction. There must be a substantial prejudice effected by the delay. *Petition of Provoo, supra.*

In the instant case petitioner was substantially prejudiced, in that witnesses disappeared and could not be located; the witnesses who were located were indefinite as to important details; the pistol, which was the most important single piece of evidence in the case, had disappeared and could not be produced by the State, and the production of the pistol would have substantiated petitioner's plea of self-defense and the further plea that he was acting in the defense of another whose life was being threatened by the person who was shot. Certainly, the defense of lack of a speedy trial was providently raised, because it was immediately made before the jury was impaneled and at the very commencement of the trial (R-19-R-23).

The defense of lack of a speedy trial is of no effect where a defendant causes the delay; but there is no showing in the instant case that petitioner did anything to delay presentment of this case to the grand jury. Furthermore, there is no showing in the record that the State gave any reason for the delay in presenting this case to the grand jury.

This Court has held that factors to be considered in determining whether a defendant has been deprived of his right to a speedy trial are: length of delay, reasons for delay, prejudice to the defendant, and waiver by the defendant. *Buatte* v. *U. S.*, (C.A., Ariz., 1965) 350 F.2d 389, cert. denied 385 U.S. 856, 87 S.Ct. 104, 17 L.Ed.2d 83.

In the instant case, there was an inordinate delay in presenting the case to the grand jury; the State gave no reason for the delay; the delay prejudiced the petitioner, as heretofore shown; and there is nothing in the record that petitioner waived his right to a speedy trial.

The right to a speedy trial is grounded in *Magna Carta*, wherein it is provided:

> "To no one will we sell, to no one deny or delay, right or justice." See *Petition of Provoo, supra.*

RELIEF

For the foregoing reasons, and under the decisions of this Honorable Court, the petition for writ of certiorari should be granted.

Respectfully submitted,

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